

WACTOR & WICK LLP

1 William D. Wick (State Bar No. 063462)
2 WACTOR & WICK LLP
3 180 Grand Avenue, Suite 950
4 Oakland, CA 94612
5 Telephone: (510) 465-5750
6 Facsimile: (510) 465-5697

7 Attorneys for Defendants
8 THE GLIDDEN COMPANY and
9 HSCM-20-20 INC.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 STATE OF CALIFORNIA DEPARTMENT
13 OF TOXIC SUBSTANCES CONTROL,

14 Plaintiff,

15 vs.

16 BAY AREA DRUM COMPANY, INC;
17 DAVID H. CANNON; HSCM-20-20 INC.;
18 and THE GLIDDEN COMPANY

19 Defendants.

No. C 02-1886 PJH

NOTICE OF MOTION AND MOTION
OF THE GLIDDEN COMPANY &
HSCM-20 INC. FOR JUDICIAL
APPROVAL OF SETTLEMENT
AGREEMENT AND CONSENT
DECREE; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF

Date: September 10, 2003

Time: 9:00 a.m.

The Hon. Phyllis J. Hamilton

20
21
22
23
24
25
26
27
28
No. C 02-1886 PJH

Notion of Motion and Motion of Defendants Glidden and HSCM-20 for Judicial Approval of Settlement Agreement and Consent Decree

ORIGINAL
FILED

03 JUL 16 PM 1:14

RICHARD W. WICKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TABLE OF CONTENTS

	Page
NOTICE OF MOTION AND MOTION	1
MEMORANDUM OF POINTS AND AUTHORITIES	1
I. STATEMENT OF THE ISSUE	1
II. SUMMARY OF ARGUMENT	2
III. THE FACTS	3
A. Site Background	3
B. Consent Decree Settlement Negotiations	3
C. Consent Decree Provisions	5
D. Notice of the Motion	6
IV. ARGUMENT	7
A. The Consent Decree Is Procedurally Fair	8
B. The Consent Decree Is Substantively Fair	8
C. The Consent Decree is Reasonable	8
D. The Consent Decree Is Consistent with the Purposes that CERCLA Is Intended to Serve	9
V. CONCLUSION	10

TABLE OF AUTHORITIES

CasesPage

State of Arizona v. Components, Inc., 66 F.3d 213, 216
(9th Cir. 1995)

7

*State of California Department of Toxic Substances Control v.
Aerojet-General Corporation, et al.*, N.D. Cal.
No. C 00-4796 PJH (July 11, 2001)

2

United States v. Bay Area Battery
95 F.Supp.1524, 1528 (N.D. Fla.1995)

7

United States v. Cannons Eng'g. Corp.
899 F.2d 79, 85 (1st Cir.1990)

7

United States v. DiBiase
45 F.3d 541, 543 (1st Cir.1995)

7

United States v. Montrose Chem. Corp.
50 F.3d 741, 743-746 (9th Cir.1995)

7

StatutesPage

42 U.S.C.

§ 9601

1, 9

§ 9613(f)

passim

§ 9613(g)(2)

9

§ 9622

7

§ 9622(g)

10

§ 9622(h)(1)

10

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on September 10, 2003 at 9:00 a.m., or as soon thereafter as this matter can be heard, in the Courtroom of the Honorable Phyllis J. Hamilton, in the United States District Court for the Northern District of California, 450 Golden Gate Avenue, 17th Floor, San Francisco, California, defendants HSCM-20 Inc. ("HSCM-20") and The Glidden Company ("Glidden") and defendants Bay Area Drum Company, Inc. and David H. Cannon, and plaintiff State of California Department of Toxic Substances Control ("DTSC"), will move the Court to approve and enter as a consent decree of the Court, pursuant to 42 U.S.C. section 9613(f), the Settlement Agreement and Consent Decree (the "Consent Decree") entered into and by and among DTSC and each of the defendants, concerning alleged liability for response costs and cleanup of the Bay Area Drum Site in San Francisco, California. The Consent Decree will be lodged with the Court concurrently with the filing of this motion.

This motion will be based on, among other things, this Notice of Motion and the following Memorandum of Points and Authorities, the Consent Decree lodged herewith, and the Declaration of William D. Wick filed herewith. This motion will also be based on the Memorandum of Points and Authorities submitted by plaintiff DTSC and the declarations accompanying that Memorandum.

MEMORANDUM OF POINTS AND AUTHORITIES**I. STATEMENT OF THE ISSUE**

Whether the Consent Decree resolving the alleged liability of HSCM-20 and Glidden to DTSC is reasonable, fair and consistent with the purposes that the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, is intended to serve, and thus should be approved and entered as a Consent Decree of the Court.

II. SUMMARY OF ARGUMENT

HSCM-20 and Glidden (and the DTSC, as explained in its Memorandum) seek the Court's approval and entry of the Consent Decree under section 113(f) of CERCLA, 42 U.S.C. section 9613(f). The Consent Decree resolves DTSC's claims against each of the defendants for recovery of the costs DTSC has incurred, and may incur in the future, in response to the release and threatened release of hazardous substances at the former drum reconditioning facility located at 1212 Thomas Avenue, San Francisco, California (the "Property"). (The total area to which hazardous substances have been released or threatened to be released at and from the Property is referred to as the "Site"). The Consent Decree also resolves any responsibility the defendants might have to conduct environmental removal and remedial activities in response to the release and threatened release of hazardous substances at the Site, subject only to a standard "reopener" provision.

Pursuant to the Consent Decree, HSCM-20 and Glidden will pay a total of \$260,000. This sum is generous, given the dearth of evidence relating to the alleged disposal of hazardous substances by HSCM-20 and Glidden at the Property.

The terms of the Consent Decree result from difficult arms-length bargaining between DTSC and defendants HSCM-20 and Glidden. After years of disagreement and failed settlement efforts, DTSC and defendants HSCM-20 and Glidden were able to reach agreement only during a day-long settlement conference supervised by the Honorable Bernard Zimmerman of this Court.^{1/} The negotiation of the Consent Decree was thus procedurally fair.

For these reasons, and as discussed more fully below, the Consent Decree is

^{1/}The provisions of the proposed Consent Decree, other than the consideration for the Consent Decree to be provided by the defendants, are essentially identical to those contained in the Settlement Agreement and Consent Decree entered by the Court in *State of California Department of Toxic Substance Control v. Aerojet-General Corporation, et al.*, N.D. Cal. No. C 00-4796 PJH, approved and entered by the Court on July 11, 2001, which embodied DTSC's settlement with members of the Bay Area Drum Site *Ad Hoc* Potentially Responsible Party Group ("the PRP Group"), 65 entities alleged to have sent hazardous substances (or successors to entities that sent hazardous substances) to the Site. HSCM-20 and Glidden were not members of the PRP Group.

1 reasonable, fair and consistent with the purposes that CERCLA is intended to serve, and
2 should be approved and entered as a consent decree of the Court.

3 **III. THE FACTS**

4 **A. Site Background**

5 The Property was operated as a drum reconditioning facility for almost 40
6 years, from 1948 to 1987. Facility operations allegedly included receiving, cleaning,
7 reconditioning, repainting and selling used drums. In the course of those operations,
8 DTSC alleges that hazardous substances were released at the Site. The Site has been
9 cleaned up, and DTSC is now seeking to recover response costs.

10 **B. Consent Decree Settlement Negotiations**

11 DTSC filed this action in April 2002, naming HSCM-20 and Glidden among
12 the defendants. Beginning in July 2002, counsel for HSCM-20 and Glidden had a
13 number of conversations with counsel for DTSC about settlement. The parties were
14 unable to reach agreement in those conversations.

15 **1. Evidence that HSCM-20 or Glidden Arranged for the Disposal of** 16 **Hazardous Substances at the Site.**

17 (a) **Documentary Evidence** There was virtually no documentary evidence
18 that HSCM-20 or Glidden contaminated the Site. And the few documents that did
19 exist—13 pages of documents (apparently generated by one of the Property's
20 owner/operators, the Waymire Drum Company) titled "Invoice Control," with entries for
21 Glidden and other entities—indicated only that Glidden entered into some kind of
22 transaction at the facility—not necessarily that Glidden disposed used drums containing
23 hazardous substances. Glidden thought the better interpretation of those documents
24 was that they reflected the *purchase* of reconditioned drums. Given the round numbers
25 that generally appear on the documents under the column heading "Quantity," as well as
26 the narrow variations in drum types that appear on the documents under the column
27
28

1 heading "Description," the more plausible explanation is that the documents are records
2 of the purchase of reconditioned drums by Glidden. In addition, at least two of the
3 Waymire documents contained what appear to be cost information for Glidden ("@9.50,"
4 interpreted to be \$9.50 per drum) with an amount that is well in excess of the amount
5 which would have been paid to Glidden in 1978 for a used drum (but which is consistent
6 with the amount Glidden would have been charged to purchase a reconditioned drum
7 during that time period). Moreover, another Waymire document contains the notation
8 "Cash Sale" on line 5, indicating the sale of reconditioned drums, and *not* the disposal
9 of used drums.

10
11 **(b) Jack Hamilton's Testimony**

12 DTSC acknowledged the ambiguity in the documentary evidence, but believed
13 that a witness—Jack Hamilton—would testify about his recollection of Glidden's
14 disposal at the Site. Mr. Hamilton was deposed on December 12, 2002.

15 Mr. Hamilton worked at the Site for a number of years as a truck driver, and
16 even operated the Site for a brief period of time as an owner/operator. In his deposition,
17 Mr. Hamilton testified that he had knowledge of Glidden drums going to the Site only in
18 three specific periods:

19 (1) 1970 to 1972 (when he testified he picked up Glidden drums and took them
20 to the Site);

21 (2) about 1970, when he took drums he was told were from Glidden from Bauer's
22 Cooperage to the Site over a six month period (though there is a significant
23 variance from a Hamilton statement to DTSC, in which he estimated 2,000
24 drums, and the deposition, in which he estimated 7,500 to 10,000 drums);
25 and

26 (3) 1978-1979, when he surmised that Glidden drums were sent to the Site
27 (though he admitted he did not take them to the Site or work at the Site at the
28 time).

1 **2. Parties Unable to Agree on Evidence or Settlement**

2 Both before and after the Jack Hamilton deposition, DTSC and defendants
3 HSCM-20 and Glidden had radically different views of the strength of the evidence, and
4 thus very different views about an appropriate settlement amount. Until the mediation,
5 the parties could not reach agreement, despite good faith efforts to do so.
6

7 **3. Settlement Conference**

8 A settlement conference was held in this matter before Magistrate Judge
9 Zimmerman, on January 16, 2003.

10 DTSC and defendants HSCM-20 and Glidden reached the agreement
11 memorialized in the Consent Decree after a day of negotiations mediated by Judge
12 Zimmerman. Those negotiations were attended by counsel for DTSC; Barbara J. Cook,
13 P.E., Chief of DTSC's Northern California-Coastal Cleanup Operations Branch; and
14 counsel for HSCM-20 and Glidden. The settlement conference was also attended by
15 counsel for BAD and Cannon; counsel for TIG insurance, and by Nicholas W. Van
16 Aelstyn, Esq., counsel for the PRP Group.²
17

18 **C. Consent Decree Provisions**

19 The Consent Decree is intended fully to resolve any liability on the part of
20 HSCM-20 and Glidden to reimburse DTSC the costs it has incurred conducting and
21 supervising removal and remedial activities in response to the release and threatened
22 release of hazardous substances at the Site, and any obligation HSCM-20 and Glidden
23 might have to DTSC to perform removal and remedial activities in response to that
24 release and threatened release. (Consent Decree ¶ 5.1.) The Consent Decree is also
25 intended to provide HSCM-20 and Glidden protection against third party claims for
26 contribution under 42 U.S.C. section 9613(f). (*Id.* ¶¶ 7.2 & 7.3.) In return for this

27 ² Neither the Group nor any member of the Group has intervened or sought intervention in these
28 proceedings.

1 resolution of liability, HSCM-20 and Glidden will pay DTSC the total sum of \$ 260,000.
2 (*Id.* ¶ 3.2.) The Consent Decree contains a "reopener" provision, allowing DTSC to
3 pursue HSCM-20 and Glidden for costs incurred responding to certain specified
4 conditions, previously unknown to DTSC, and discovered at the Site after the entry of the
5 Consent Decree. (*Id.* ¶ 4.2.)
6

7 **D. Notice of the Motion**

8 In order to ensure that all interested parties receive proper of the Consent
9 Decree, upon the establishment of a briefing and hearing schedule by the Court, DTSC
10 will mail a copy of the Consent Decree, the Motion and DTSC's Memorandum of Points
11 and Authorities, this Memorandum of Points and Authorities submitted by HSCM-20 and
12 Glidden in support of this Motion, all Declarations submitted in support of this Motion, the
13 Proposed Order granting this Motion, and any Court order establishing a briefing and
14 hearing schedule to: (1) the other potential responsible parties identified by DTSC with
15 respect to this Site;³ (2) approximately 53 persons or entities who or which reside or
16 conduct business operations on, or own, real property adjacent to or in the vicinity of the
17 Property, and 83 addresses adjacent to or in the vicinity of the Property; and (3) the
18 approximately 134 other persons and entities on DTSC's mailing list (other than elected
19 officials and news media) who or which have requested notice from DTSC regarding
20 activities at the Site, or who or which automatically receive such notice. (Decl. of Kevin
21 James ¶13.) Counsel for DTSC will file an appropriate Proof of Service after conducting
22 this mailing. (*Ibid.*)
23

24
25 ³ DTSC will send such notice to counsel for any responsible party which DTSC knows to be
26 represented by counsel. DTSC will not send such notice to counsel for Witco Corporation; Exxon
27 Company, U.S.A.; Waymire Drum Company, Inc.; and Edward L. Waymire, each of whom or which is
28 subject to a consent decree entered by this Court more than 4 years ago, pursuant to which DTSC
resolved its Site-related claims against him or it.

IV. ARGUMENT

This Court should approve the Consent Decree as fair, reasonable, and consistent with the purposes that CERCLA is intended to serve.

In reviewing a proposed consent decree under 42 U.S.C. section 9613(f),⁴ the Court's "function is circumscribed: it must ponder the proposal only to the extent needed to 'satisfy itself that the settlement is reasonable, fair and consistent with the purposes that CERCLA is intended to serve'." *United States v. DiBiase*, 45 F.3d 541, 543 (1st Cir.1995) (quoting *United States v. Cannons Eng'g. Corp.*, 899 F.2d 79, 85 (1st Cir.1990)). Accord, *United States v. Montrose Chem. Corp.*, 50 F.3d 741, 743-746 (9th Cir.1995) ("*Montrose*").

The Court's review should be guided by CERCLA's express policy of encouraging settlements. (*Montrose*, 50 F.3d at 746.) Moreover, decrees negotiated by a public agency charged with furthering the public interest enjoy a "presumption of validity;" "[i]t is not the Court's place to determine whether the decree represents an optimal settlement in the Court's view." *United States v. Bay Area Battery*, 895 F.Supp.1524, 1528 (N.D. Fla. 1995) (approving proposed CERCLA consent decree) (citations omitted). See also, *Montrose*, 50 F.3d 746 ("CERCLA's policy of encouraging early settlements is strengthened when a government agency charged with protecting the public interest 'has pulled the laboring oar in constructing the proposed settlement'." (quoting *Cannons* 899 F.2d at 84)).

In applying the standard set forth above, courts consider four criteria: (1) procedural fairness; (2) substantive fairness; (3) reasonableness; and (4) fidelity to CERCLA. (See, *Cannons*, 899 F.2d at 85-93.) This Consent Decree satisfies each of

⁴ The Consent Decree has been entered into pursuant to 42 U.S.C. section 9313(f), and not 42 U.S.C. section 9622 (which applies only to settlements entered into between the United States and responsible parties). *State of Arizona v. Components, Inc.*, 66 F.3d 213, 216 (9th Cir. 1995).

1 these criteria.

2
3 **A. The Consent Decree Is Procedurally Fair**

4 DTSC negotiated the settlement terms memorialized in the Consent Decree
5 with HSCM-20 and Glidden at arm's-length. Indeed, settlement negotiations foundered,
6 and the settlement agreement was achieved only at a settlement conference conducted
7 by Magistrate Judge Zimmerman. (Decl. of William Wick, ¶14.)

8
9 **B. The Consent Decree Is Substantively Fair**

10 The Consent Decree provides that HSCM-20 and Glidden will pay DTSC a total
11 of \$ 260,000. This settlement amount is substantial, in view of the fact that there was no
12 clear documentary evidence that defendants HSCM-20 and Glidden arranged for the
13 disposal of hazardous substances at the site. DTSC's case was based almost entirely
14 on the recollections of one individual, Jack Hamilton, whose testimony about alleged
15 disposal by defendants HSCM-20 and Glidden was limited to certain time periods and
16 was inconsistent in some key respects. (Decl. of William Wick, ¶12.)

17
18 **C. The Consent Decree Is Reasonable**

19 The *Cannons* court considered three factors in determining whether the
20 consent decree before it was reasonable: (1) whether the settlement would likely be
21 effective in ensuring a cleanup of the site; (2) whether the settlement would adequately
22 compensate the public; and (3) whether the settlement reflected the relative strength of
23 the parties' bargaining positions. See, *Cannons*, 899 F.2d at 89-90. Because the Site
24 has already been cleaned up, only the last two criteria are relevant.

25 The Consent Decree adequately compensates the public. Pursuant to the
26 Consent Decree, DTSC will receive \$ 260,000 from HSCM-20 and Glidden. DTSC will
27 be spared the expense of litigating the liability of HSCM-20 and Glidden for the costs
28 that DTSC has incurred and may incur in connection with the Site. Moreover, the

1 Consent Decree protects the public by explicitly allowing DTSC to seek further costs
2 from HSCM-20 and Glidden if DTSC learns of previously unknown conditions at the Site,
3 or obtains new information about the Site not previously available to it, that
4 demonstrates that the environmental response activities conducted at and for the Site
5 are inadequate.

6 The Consent Decree also reflects the relative strength of the parties' bargaining
7 positions. CERCLA is a significant enforcement tool, and DTSC had arguments that
8 defendants HSCM-20 and Glidden were liable under CERCLA. But even CERCLA
9 requires evidence and is not unlimited in its scope. Defendants HSCM-20 and Glidden
10 had arguments that there was no clear and reliable evidence that they arranged for this
11 disposal of hazardous substances, and that other defenses applied, including those
12 based upon the statute of limitations and the failure of DTSC to comply with the National
13 Contingency Plan. (Decl. of William Wick, ¶6.)

14 The terms of the Consent Decree adequately protect the public interest and
15 reflect the relative bargaining strengths of DTS and HSCM-20 and Glidden. Thus, the
16 Consent Decree is reasonable.

17
18 **D. The Consent Decree Is Consistent with the Purposes that CERCLA Is**
19 **Intended to Serve**

20 One of the purposes of CERCLA is to allow government agencies to recover
21 their environmental response costs rapidly, so that the sums recovered can be used
22 either at the same site or at other sites. *See, e.g.,* 42 U.S.C. section 9601(a)
23 (authorizing recovery of interest on environmental response costs from the date of
24 demand of payment); 42 U.S.C. section 9613(f)(2) (providing contribution protection to
25 parties settling with a government agency in an administrative or judicially approved
26 settlement, thereby encouraging the settlement of CERCLA claims); 42 U.S.C. section
27 9613(g)(2) (requiring a court holding a defendant liable under CERCLA for a government
28 agency's past environmental response costs to enter declaratory judgment against the

1 defendant, and in favor of the government agency, on liability for future environmental
2 response costs, thereby speeding the recovery of future response costs); 42 U.S.C.
3 section 9622(g) (requiring the United States Environmental Protection Agency to
4 conclude *de minimis* settlement agreements whenever practicable and in the public
5 interest); and 42 U.S.C. section 9622(h)(1) (allowing federal agency heads to settle
6 CERCLA claims at smaller sites without United States Department of Justice approval).

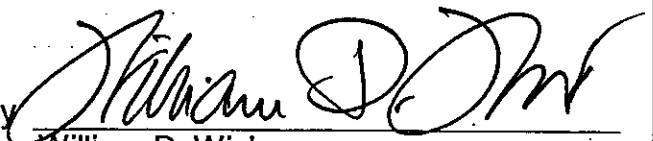
7 The provisions of the Consent Decree resolving DTSC's claims against HSCM-
8 20 and Glidden afford DTSC rapid and certain recovery of a significant sum of money
9 from HSCM-20 and Glidden that it can put to use at other sites at which it is conducting
10 cleanup activities. Absent the Consent Decree, DTSC would be put to the expense,
11 delay and risk in litigating the underlying liability of defendants HSCM-20 and Glidden.
12 The Consent Decree thus clearly furthers one of the key purposes of CERCLA — to
13 ensure the rapid and certain recovery of response costs by government agencies.

14
15 **V. CONCLUSION**

16 For the foregoing reasons, HSCM-20 and Glidden respectfully request this
17 Court to approve the provisions of the Consent Decree resolving DTSC's claims against
18 defendants HSCM-20 and Glidden, and to enter the Consent Decree.

19 DATED: July 16, 2003

20
21 WACTOR & WICK LLP

22
23
24 By 
25 William D. Wick
26 Attorneys for Defendants
27 THE GLIDDEN COMPANY
28 and HSCM-20-20 INC.